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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MATIAS BRAVO HERNANDEZ,

Defendant and Appellant.

H026853

(Santa Clara County  
Super. Ct. No. CC262046)

Defendant Matias Bravo Hernandez entered into a plea bargain. The bargain, as recited by the prosecutor, did not mention the fines required by Penal Code sections 1202.4<sup>1</sup> (restitution fund fine) and 1202.45 (parole revocation fine). At sentencing, the court imposed the agreed-upon prison term and also imposed a restitution fund fine of \$10,000 and a parole revocation fine in the same amount.

We appointed counsel to represent defendant in this court. Appointed counsel filed an opening brief that states the case and the facts but raises no specific issues. After reviewing the record, we solicited briefing on the question of whether imposition of the restitution fund fine and parole revocation fine violated the terms of defendant's plea bargain. We now conclude that the fines did not violate the plea bargain and affirm the judgment.

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<sup>1</sup> Hereafter all statutory references are to the Penal Code.

## **I. FACTS**

The information charged defendant with four sex offenses. The information further alleged, in connection with two of the counts, that defendant had committed the offenses against more than one victim. (§ 667.61, subds. (b), (c), (e).) As charged, defendant could have received two life terms consecutive to 25 years and four months in prison.

The terms of defendant's plea bargain, as stated by the prosecutor at the beginning of the change of plea hearing, were that the People would ask the court to strike the section 667.61 allegations and "Defendant will then plead as charged to Counts 1 through 4 for [the] negotiated term of twenty-five years four months in state prison."

The trial court granted the request to strike the section 667.61 allegations. Before taking defendant's guilty plea, the trial court questioned him and advised him of the direct consequences of pleading guilty. Defendant acknowledged that he had been made no promises other than those stated before the court and that he understood "actual sentencing is up to the judge." The court went on to explain: "I will have to assess you up to \$450 for the probation report, at least \$200 and up to \$10,000 for the restitution fund fine, a criminal justice administration fee of \$140.50 for each jurisdiction. [¶] And are there any other fines that you can think of?" Both counsel responded to this question in the negative. The court went on to ask defendant some questions about himself, then asked: "And do you have any questions about anything," to which defendant said, "No." The court did not advise defendant that he was entitled to withdraw his plea if the court ultimately failed to approve the bargain. (§ 1192.5.) After obtaining defendant's acknowledgment of the rights he was giving up, the court accepted his guilty plea.

A probation report was prepared, which recommended that the court impose a restitution fund fine and a parole revocation fine of \$10,000 each. The trial court sentenced defendant to the agreed-upon 25 years and four months in prison and imposed the fines recommended by the probation report. Defendant did not object to the sentence.

## II. DISCUSSION

Defendant argues that the terms of his plea bargain were set forth in the prosecutor's on-the-record recitation of the agreement. Since that recitation did not contain any reference to fines, defendant contends that the imposition of the \$10,000 fines is a breach of the plea bargain. We disagree.

The statutory bases for the fines at issue are sections 1202.4 and 1202.45. Section 1202.4, subdivision (a)(3)(A) mandates judicial imposition of a restitution fund fine whenever a person is convicted of a crime. The trial court shall impose the fine "unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (§ 1202.4, subd. (c).) In the absence of extraordinary reasons, the minimum fine the court must impose is \$200 (formerly \$100). (*Id.* subd. (b)(1).) The court has discretion to impose a fine of up to \$10,000. (*Id.* subd. (d).) The general guideline is that the fine should be "commensurate with the seriousness of the offense." (*Id.* subd. (b)(1).) Section 1202.45 mandates an additional fine duplicating the amount of the restitution fine. This fine takes effect only if parole is revoked.

*People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*) is the seminal case involving imposition of a restitution fund fine in the context of a plea bargain. In *Walker*, the defendant entered a guilty plea in exchange for a promise of a five-year prison term. The defendant signed a change of plea form indicating his understanding of the agreement. The trial court orally explained to defendant: " 'the maximum penalties provided by law for this offense are either 3 years, 5 years, or 7 years in state prison and a fine of up to \$10,000,' followed by a period of parole." (*Id.* at p. 1019.) The court's mention of "a fine of up to \$10,000" was presumably a reference to the general penal fine available under section 672 after any felony conviction for which no other fine is prescribed. Thus, the court did not advise the defendant of the restitution fund fine, which was then at least \$100 and no more than \$10,000. (*Walker, supra*, 54 Cal.3d. at p. 1019.) A probation report, prepared before defendant changed his plea, recommended a \$7,000 restitution

fund fine. This was the only reference to restitution in the record prior to sentencing. At the sentencing hearing, the court imposed the agreed-upon prison term and also imposed a \$5,000 restitution fund fine. (*Ibid.*) *Walker* held that this fine violated the plea bargain.

*Walker* explained that “two related but distinct legal principles” were involved. (*Walker, supra*, 54 Cal.3d at p. 1020.) One was “ ‘a judicially declared rule of criminal procedure’ ” (*id.* at p. 1022) that, before entering a guilty plea, a defendant be judicially advised “of the direct consequences of the plea.” (*Id.* at p. 1020.) The court held that before taking any guilty plea a trial court should advise the defendant of the minimum and maximum restitution fine. (*Id.* at p. 1022.) Defendant does not challenge the adequacy of the advisement in this case.

The second legal principle *Walker* addressed is that “the parties must adhere to the terms of a plea bargain.” (*Walker, supra*, 54 Cal.3d at p. 1020.) The punishment imposed “may not significantly exceed that which the parties agreed upon.” (*Id.* at p. 1024; cf. § 1192.5.) Where a violation of the bargain involves the imposition of a significant restitution fine, the remedy on appeal is to reduce the fine to the mandatory minimum. (*Walker, supra*, 54 Cal.3d at pp. 1028-1030.) This is the principle defendant invokes here.<sup>2</sup>

Defendant contends that this case is just like *Walker* in that the problem is the failure to specifically include the restitution fund fine in the plea agreement. We think

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<sup>2</sup> Although defendant did not object to imposition of the fine, since the trial court did not give defendant a section 1192.5 admonition, his failure to object does not bar the claim on appeal. (*Walker, supra*, 54 Cal.3d at p. 1026.) Section 1192.5 provides that where the court approves a plea, the court must inform the defendant that if the court ultimately withdraws its approval, the defendant is entitled to withdraw the plea. Thus, if a defendant receives a section 1192.5 admonition and then fails to withdraw the plea or object to a fine to which he did not agree, he has waived the right to complain that the sentence violates the terms of the bargain. (*Walker, supra*, 54 Cal.3d. at p. 1026.) But if the admonition was not given, defendant’s constitutional right to the benefit of his bargain is not waived by a mere failure to object at sentencing. (*Id.* at p. 1025.)

defendant is misreading *Walker*. Although the *Walker* court recommended that the “[c]ourts and the parties should take care to consider restitution fines during the plea negotiations” (*Walker, supra*, 54 Cal.3d at p. 1030), *Walker* should not be understood as holding that the restitution fines must necessarily be the subject of plea negotiations in every criminal case. “The parties to a plea agreement are free to make any lawful bargain they choose.” (*People v. Buttram* (2003) 30 Cal.4th 773, 785.) *Walker* does not prohibit criminal defendants from striking whatever bargains appear to be in their best interests, including leaving the imposition of fines to the discretion of the sentencing court. Referring to the substantial (\$5,000) restitution fine the trial court imposed in *Walker*, the Supreme Court later explained: “In concluding that the imposition of such a substantial fine constituted a violation of the plea agreement in *Walker*, we implicitly found that the defendant in that case reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed.” (*In re Moser* (1993) 6 Cal.4th 342, 356.) That is, the proper focus of the inquiry is upon the defendant’s reasonable understanding of the plea agreement.

In *Walker*, the defendant was never told, so far as the opinion reveals, that if he pled guilty in exchange for a promise of a five-year prison sentence, he would nevertheless be subject to a restitution fine within the range prescribed by the statute. Although it is true that the trial court in *Walker* mentioned the possibility of a fine, the Supreme Court found that the advisement was inadequate. “The court should have advised defendant there was a possible \$10,000 penalty fine *and* a mandatory restitution fine of between \$100 and \$10,000.” (*Walker, supra*, 54 Cal.3d at p. 1029.) The only mention of a restitution fine occurred in the probation report, which was prepared *before* the change of plea hearing. Furthermore, although the Supreme Court characterized the trial court’s reference to “a fine of up to \$10,000” as part of the court’s advising defendant of the consequences of his plea, we note that the reference was made in the course of explaining the penalties to which the defendant would have been subject

without an agreement. (The trial court said: “ ‘the maximum penalties provided by law for this offense are either 3 years, 5 years, or 7 years in state prison and a fine of up to \$10,000,’ followed by a period of parole.” (*Id.* at p. 1019.)) Thus, there was really no basis in *Walker* upon which the reviewing court could have concluded that the defendant understood he would be subject to a restitution fine in spite of his plea. The very opposite is true here.

The trial court specifically advised defendant of the consequences of his plea, including the fact that it would result in his having four strikes, that he would have to register as a sex offender, and that the court would have to assess him “at least \$200 and up to \$10,000 for the restitution fund fine.” Surely, if defendant’s agreement had contemplated anything other than permitting the sentencing court to exercise its discretion in imposing the fine, he or his counsel would have made some response to this advisement. But that did not happen. Instead, when the court asked if there were any other fines the court would be required to assess, defendant’s counsel responded in the negative. That is, by denying that there were *any other* fines to assess, counsel implicitly agreed that the court was to retain discretion in assessing the restitution fund fine within the range the court had just recited. Defendant acknowledged that he had received no promises other than those mentioned before the court. Further, the probation report prepared after the change of plea hearing provided notice to defendant that a \$10,000 fine was recommended. When the court proceeded to impose the recommended amount, defendant again did not object. We mention the lack of objection, not to establish waiver, but to demonstrate that nobody in the trial court seemed to think that the imposition of the restitution fines violated the terms of the bargain. On this record, defendant could not reasonably have believed that his plea excluded the imposition of a significant restitution fine. Rather, it appears to us that the parties at least implicitly agreed that additional punishment in the form of statutory fines and fees would be left to the discretion of the

sentencing court. It follows that the imposition of significant fines pursuant to sections 1202.4 and 1202.45 does not violate the plea bargain.<sup>3</sup>

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we have reviewed the entire record and have concluded that there are no other arguable issues on appeal.

### **III. DISPOSITION**

The judgment is affirmed.

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Premo, J.

I CONCUR:

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Rushing, P.J.

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<sup>3</sup> This conclusion is consistent with this court's recent decisions in *People v. Dickerson* (2004) 122 Cal.App.4th 1374 and *People v. Knox* (2004) 123 Cal.App.4th 1453.

MIHARA, J., dissenting.

I dissent for the same reasons I dissented in *People v. Knox* (2004) 123  
Cal.App.4th 1453. (*Knox* at pp. 1463-1465, Mihara, J., dissenting.)

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Mihara, J.